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MD ZUBIR HAMID & ORS v. ZAHARI SALLEH & ORS

COURT OF APPEAL, PUTRAJAYA
HAMID SULTAN ABU BACKER JCA
ABANG ISKANDAR JCA
VERNON ONG LAM KIAT JCA
B [CIVIL APPEAL NO: K-02(NCVC)(W)-1823-10-2016]
11 MAY 2017

C ***LAND LAW:*** *Sale of land – Administrator – Action by beneficiaries of estate – First respondent obtained ex parte court order to appoint himself as sole administrator of deceased's estate – First respondent sold land to purchasers without obtaining leave of court pursuant to s. 60(4) of Probate and Administration Act 1959 – Whether purchasers given good title – Whether sale and purchase of land null and void*

D ***SUCCESSION:*** *Administration of estates – Administrator – Action by beneficiaries of estate – First respondent obtained ex parte court order to appoint himself as sole administrator of deceased's estate – First respondent sold land to purchasers without obtaining leave of court pursuant to s.60(4) of Probate and Administration Act 1959 – Whether purchasers given good title – Whether sale and purchase of land null and void*

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The plaintiffs ('the appellants') and the first defendant ('the first respondent') were the beneficiaries of the estate of the deceased. The appellants alleged that the first respondent had fraudulently obtained an *ex parte* court order ('*ex parte* order') to appoint himself as the sole administrator of the deceased's estate particularly the one involved with a land in Mukim Pengkalan Kundur F ('the land'). The first respondent then entered into a sale and purchase agreement with the fourth defendant ('D4') and the land was transferred to the second defendant ('D2'), the third defendant ('D3') and D4. The appellants lodged a police report to protect their interest on the land and demanded D2, D3 and D4 return the land but they refused to do so. The G appellants thus filed their claims at the High Court for, *inter alia*, the following prayers (i) a declaration that the *ex parte* order be void and revoked ('prayer 1'); (ii) that the transfer of the land from the first respondent to D2, D3 and D4 be declared void and struck off ('prayer 2'); (iii) that the land administrator should re-register the land into the name of its original owner H *ie* the deceased ('prayer 3'); (iv) an order that the power to administer the estate of the deceased be given back to one Hj Saud Hj Deris and one Mohd Salleh Hj Deris ('prayer 4'); and (v) an injunction to prevent the first respondent, D2, D3 and D4 from conducting any business on the land ('prayer 5'). The High Court, however, dismissed the appellants' claim and I hence this appeal.

Held (allowing appeal in part with costs)
Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:

(1) The first respondent as administrator of the estate had sold the land without leave of court. Obtaining leave of court to sell an estate property is a mandatory requirement under the Probate and Administration Act 1959 ('PA 1959') and that procedure, as a matter of practice, requires the court to inquire the views of the beneficiaries. Thus, the failure of the first respondent to comply with s. 60(4) of PA 1959 rendered the sale of the property null and void. The first respondent could not have given good title to D2, D3 and D4. (paras 2 & 7)

(2) As the sale and transfer was void, it would follow that the appellants would be entitled to prayer (2), (3) and (5) as of right with an order of damages before the Registrar of the High Court. Prayer (1) in the instant case also ought to be allowed and in respect of prayer (4), it now rested upon the beneficiaries to apply for letters of administration according to law. (paras 7 & 8)

Bahasa Malaysia *Headnotes*

Plaintif-plaintif ('perayu-perayu') dan defendan pertama ('responden pertama') adalah benefisiari-benefisiari estet si mati. Perayu-perayu mendakwa bahawa responden pertama telah, secara menipu, memperoleh perintah *ex parte* ('perintah *ex parte*') bagi melantikkan diri sebagai pentadbir tunggal estet si mati terutamanya yang melibatkan sebidang tanah di Mukim Pengkalan Kundur ('tanah'). Responden pertama kemudian memasuki satu perjanjian jual beli dengan defendan keempat ('D4') dan tanah itu dipindah milik kepada defendan kedua ('D2'), defendan ketiga ('D3') dan D4. Perayu-perayu membuat laporan polis bagi melindungi hak-hak mereka atas tanah itu dan meminta D2, D3 dan D4 mengembalikan tanah itu tetapi mereka enggan berbuat demikian. Perayu-perayu, oleh itu, memfailkan tuntutan mereka di Mahkamah Tinggi untuk, antara lain, permohonan-permohonan berikut (i) satu perisytiharan bahawa perintah *ex parte* tak sah dan dibatalkan ('permohonan 1'); (ii) pemindahan tanah dari responden pertama ke D2, D3 dan D4 diisytiharkan tidak sah dan dibatalkan ('permohonan 2'); (iii) bahawa pentadbir tanah harus mendaftarkan semula tanah itu kepada nama pemilik asalnya iaitu si mati ('permohonan 3'); (iv) satu perintah bahawa kuasa untuk mentadbirkan estet si mati diberikan kepada seorang bernama Hj Saud Hj Deris dan seorang lagi bernama Mohd Salleh Hj Deris ('permohonan 4') dan (v) satu injunksi menghalang responden pertama, D2, D3 dan D4 daripada mengendalikan apa-apa urusan ke atas tanah itu ('permohonan 5'). Mahkamah Tinggi, walau bagaimanapun, menolak tuntutan perayu-perayu dan oleh itu, rayuan ini.

Diputuskan (membenarkan sebahagian rayuan dengan kos)
Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

(1) Responden pertama sebagai pentadbir estet telah menjual tanah tanpa kebenaran mahkamah. Pemerolehan kebenaran mahkamah untuk menjual tanah estet adalah satu keperluan wajib bawah Akta Probet dan Pentadbiran 1959 ('Akta') dan prosedur itu memerlukan mahkamah meminta pendapat-pendapat benefisiari-benefisiari. Oleh itu, kegagalan responden pertama memenuhi s. 60(4) Akta tersebut menyebabkan jualan tanah itu tak sah dan terbatal. Responden pertama gagal memberikan hak milik sah kepada D2, D3 dan D4.

(2) Oleh kerana jualan dan pindah milik adalah tidak sah dan terbatal, perayu-perayu berhak atas permohonan (2), (3) dan (5) sebagai hak dengan perintah ganti rugi di hadapan Pendaftar Mahkamah Tinggi. Permohonan (1) dalam kes ini juga harus dibenarkan dan berkenaan permohonan (4), adalah terletak pada benefisiari-benefisiari untuk memohon surat-surat pentadbiran menurut undang-undang yang disediakan.

Case(s) referred to:
Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***
Dato' Tan Chin Woh v. Dato' Yalumallai V Muthusamy [2016] 8 CLJ 293 FC ***(refd)***
Elitprop Sdn Bhd v. Yeo Ping Tieng & Ors And Another Appeal [2017] 10 CLJ 257 CA ***(refd)***
Heritage Grand Vacation Club Bhd v. Pacific Fantasy Vacation Sdn Bhd [2016] 7 CLJ 679 CA ***(refd)***
Kamarulzaman Omar & Ors v. Yakub Husin & Ors [2014] 1 CLJ 987 FC ***(refd)***
Samuel Naik Siang Ting v. Public Bank Bhd [2015] 8 CLJ 944 FC ***(refd)***
Shearn Delamore & Co v. Sadacharamani Govindasamy [2017] 2 CLJ 665 CA ***(refd)***
Tan Ying Hong v. Tan Sian San & Ors [2010] 2 CLJ 269 FC ***(refd)***
Yew Wan Leong v. Lai Kok Chye [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330 SC ***(refd)***

Legislation referred to:
Probate and Administration Act 1959, s. 60(4)

For the appellants - Abdul Hadi Ahmad; M/s Abdul Hadi Ahmad & Assocs
For the 2nd, 3rd & 4th respondents - Nursyahana Ismail & Jennifer Mei Fen; M/s Syahana & Ong

[Editor's note: For the High Court judgment, please see Md Zubir Hamid & Ors v. Zahari Salleh & Ors [2016] 1 LNS 790 (overruled in part).]

Reported by Suhainah Wahiduddin

JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] The appellants, beneficiaries of the deceased estate appeal against the decision of the High Court which had dismissed their claim *inter alia* for the following prayers namely:

(1) Satu deklarasi bahawa Surat Kuasa Wakil yang didaftarkan kepada nama Defendan Pertama melalui Perintah Mahkamah Tinggi Alor Setar bertarikh 05-10-1998 No. Saman Pemula 24-878-98 adalah tidak sah dan dibatalkan.

(2) Satu deklarasi bahawa pindahmilik hartanah yang terkandung di dalam no.hakmilik GRN36264 Lot 1414, Mukim Pengkalan Kundor, Daerah Kota Setar,Kedah (dahulu dikenali sebagai SP23788, Lot 1414, Mukim Pengkalan Kundor, Daerah Kota Setar, Kedah) dari Defendan Pertama kepada Defendan Kedua, Defendan Ketiga dan Defendan Keempat melalui no.perserahan 17815/1999, 17816/1999 dan 17817/1999 adalah tidak sah dan dibatalkan.

(3) Satu Perintah bahawa Pentadbiran Tanah Kota Setar dan/atau yang berkenaan diberi kuasa untuk menguatkuasakan Perintah ini dan hendaklah mendaftarkan semula hak hakmilik hartanah yang terkandung di dalam no.hakmilik GRN36264 Lot 1414, Mukim Pengkalan Kundor, Daerah Kota Setar, Kedah (dahulu dikenali sebagai SP23788, Lot 1414, Mukim Pengkalan Kundor, Daerah Kota Setar, Kedah) kepada nama pemilik asal iaitu Haji Idris Bin Haji Abdul Rahman (Simati).

(4) Satu Perintah bahawa Kuasa mentadbir harta Haji Idris Bin Haji Abdul Rahman (Simati) dikembalikan semula kepada Haji Saud Bin Haji Deris (Simati) dan Mohd Salleh Bin Haji Idris (Simati).

(5) Satu Perintah Injunksi untuk menghalang Defendan-Defendan dan/atau ejen-ejen Defendan-Defendan daripada membuat apa-apa sebarang urusniaga di atas hartanah tersebut.

(6) Gantirugi secara alternatif dan tambahan yang akan ditaksirkan kelak.

(7) Kos.

(8) Lain-lain Perintah atau relief yang difikirkan adil dan sesuaimanfaat oleh Mahkamah Yang Mulia ini.

[2] What is glaringly obvious in the instant case is that the first defendant as administrator of the estate had sold the land without the leave of court. Obtaining leave of court to sell an estate property is a mandatory requirement under the Probate and Administration Act 1959 (PA 1959), and that procedure as a matter of practice requires the court to inquire the views of the beneficiaries. The relevant section is s. 60(4) which reads as follows:

A (4) An administrator may not, without the previous permission of the Court:

(a) mortgage, charge or transfer by sale, gift, exchange or otherwise any immovable property situate in any State and for the time being vested in him; or

B (b) lease any such property for a term exceeding five years.

[3] The parties to this action did not bring to the attention of the court the provision of s. 60(4) and in consequence, the court did not deal with it. It is incumbent upon courts to ensure that the law is not breached whether or not it is the pleaded case of the parties. Pleading rules apply to facts and not C when there is a breach of the law. (See (i) *Shearn Delamore & Co v. Sadacharamani Govindasamy* [2017] 2 CLJ 665; [2016] 6 AMR 797; (ii) *Yew Wan Leong v. Lai Kok Chye* [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330; [1990] 2 MLJ 152; (iii) *Dato' Tan Chin Woh v. Dato' Yalumallai V Muthusamy* [2016] 8 CLJ 293; (iv) *Heritage Grand Vacation Club Bhd v. Pacific Fantasy* D *Vacation Sdn Bhd* [2016] 7 CLJ 679). If any order or transaction is done in breach of the mandatory provision of the law, the order and/or transaction will be a nullity *ab initio* based on the Federal Court decision of *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393.

E **[4]** On the date of hearing of the appeal, we brought to the attention of the parties to submit on the mandatory provision of the PA 1959 Act and whether there was compliance. Parties have put their further submission and it was clear that the mandatory provision was not complied with.

F **Brief Facts**

[5] The brief facts and the decision as summarised before us is repeated *verbatim* to save court's time and reads as follows:

1. The plaintiffs (PP)/appellants and 1st defendant (D1)/1st respondent are the beneficiaries of the estate of Hj Idris bin Hj Abd G Rahman ("DC"). PP alleged that D1 had fraudulently obtained an *ex parte* court order dated 20.07.1998 from Alor Setar High Court ("ex-order") to appoint himself as the sole administrator of DC's estate particularly the one involve with a land in Mukim Pengkalan Kundur in Daerah Kota Setar ("the land"). D2, D3 and D4 are the current registered owners of the land.

H 2. The ex-order was filed by D1 to substitute the 2 administrators (the 2 administrators had passed away) and to appoint D1 as sole administrator of DC estate. D1 then entered into Sale and Purchase Agreement dated 25.1.1999 ("SPA") with D4 and the land was transferred to D2, D3 and D4.

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3. PP claimed that: in 2015, P1 found that the land had been transferred to D2, D3 and D4. P1 then lodged a police report on 4.9.2015 to protect his interest on the land. PP demanded D2, D3 and D4 to return the land but D2, D3 and D4 refused to do so.

4. PP prayed for: Declaration that the ex-order is void and be revoked. Declaration that the transfer of the land is void and be revoked. Reinstatement of 2 administrators of the DC estate.

5. D1 did not enter appearance, thus, Judgment in Default against D1 had been obtained on 17.12.2015.

6. In defence D2, D3 and D4 stated that: D4 had paid full purchase price of the land to D1. D4 had no knowledge of what transpired between D1 and PP. D4 was a *bona fide* purchaser of the land. PP should have filed a challenge to ex-order and not to file new suit seeking order for the ex-order to be void. PP action was time-barred and PP failed to particularize the fraud alleged. PP's right to represent the 155 other beneficiaries was challenged.

7. High Court: The plaintiffs' claim is dismissed with costs of RM15,000. Judgment in Default against D1 is set aside.

[6] The learned judge's grounds of decision can be summarised as follows:

1. Whether the ex-order is valid.

PP claimed that D1 had obtained the ex-order by fraud. No other beneficiaries were informed about the ex-order. DW2 (Utusan Malaysia's staff) had testified that there was an advertisement made to the beneficiaries of DC and the beneficiaries of the 2 administrators made in 29.6.1998 and it was suggested to PP that D1 had made an attempt to inform the beneficiaries of DC *via* substitute service. The court found that the advertisement was clearly intended to the beneficiaries and had directed them to contact with D1. This did not amount to fraudulent act by D1 just because other beneficiaries were unaware of the advertisement. There was no reason for this court to declare the ex-order to be void.

2. Whether D1 could sell the land.

By ex-order appointing D1 as sole administrator, D1 was entitled to enter into SPA with D4. D2, D3 and D4 had a good title of the land.

3. Whether PP had cause of action to commence this suit.

There was no evidence before the court that PP were authorised by 155 other beneficiaries to represent them in this action. PW3 was not named in this action despite being named as beneficiaries in the Syariah Court Order but this did not prove that others had authorised the same.

4. Whether this action is time-barred.

Since there was no evidence for fraud, this action is time barred and PP reliance on s. 22 of Limitation Act 1953 was misplaced.

[7] We have read the appeal record and the submission of the parties in detail. After giving much consideration to the submission of the respondents, we take the view that the appeal must be allowed in part only. Our reasons *inter alia* are as follows:

(i) In the instant case, failure of the first defendant to comply with s. 60(4) of PA 1959 renders the sale of the property null and void. The first defendant could not have given good title to the second, third and fourth defendant. Support for the proposition is found in a number of cases. (See *Tan Ying Hong v. Tan Sian Son & Ors* [2010] 2 CLJ 269; [2010] 2 MLJ 1; *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 1 CLJ 987; [2014] 2 MLJ 768; *Elitprop Sdn Bhd v. Yeo Ping Tieng & Ors And Another Appeal* [2017] 10 CLJ 257. Quite recently, the Federal Court when dealing with concept of indefeasibility of title in the case of *Samuel Naik Siang Ting v. Public Bank Bhd* [2015] 8 CLJ 944; [2015] 6 MLJ 1 had *inter alia* held:

> (8) Since the subsequent SPAs with the new purchasers were void *ab initio* and of no effect, it followed that their related transfer forms ('Form 14A') were also void and ineffective to create a registrable transfer. The said Form 14A was thus a void instrument.
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> …
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> (10) The relevant Form 14A in respect of the transfer of the title to the appellant was a void instrument and therefore the appellant's title and interest in the lot was indisputably defeasible. The appellant was an immediate purchaser of the lot in question from its registered proprietor, MPM. That being the case the appellant clearly could not enjoy the benefit of the proviso to s. 340(3) of the NLC. Once the court was satisfied that the transfer of the title to the appellant arose from a void instrument, it automatically followed that they were liable to be set aside.

(ii) As the sale and transfer is void, it will follow the appellants will be entitled to prayer (2), (3) and (5) as of right with an order for assessment of damages before the Registrar of the High Court.

[8] In respect of the other prayers in the statement of claim, namely prayer (1) and (4), we take the view taking into consideration the totality of the facts and the conduct of the first defendant, in the instant case prayer (1) of the statement of claim ought to be allowed. In respect of prayer (4), it is now rest upon the beneficiaries to apply for letters of administration according to law.

[9] For reasons stated above, we allow prayers 1, 2, 3, 5 and 7 with costs and order for assessment of damages before the Deputy and/or Senior Assistant Registrar of the High Court. We will make appropriate orders as to costs after hearing the parties.

We hereby order so.